United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 12, 2010

TO : Alan Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Carpenters 46 Northern California Counties
Conference Board 584-5000
(Drywall Art & Construction)
Case 32-CE-89

This case was submitted for advice as to whether the Respondent Union violated Section 8(e) by reaffirming a union signatory clause in a collective bargaining agreement to prohibit the non-union Charging Party subcontractor from working on a construction project.

FACTS

Charging Party Drywall Art & Construction provides construction industry services such as metal studs framing and drywall installation for residential and commercial structures. In early November 2009, the Charging Party received an invitation from Zolman Construction and Development, a construction general contractor, to submit a bid for the installation of light gauge metal framing, drywall and acoustical ceilings for the Calabasas public library construction project for the City of San Jose. Zolman is a me-too signatory to the Respondent Carpenters 46 Northern California Counties Conference Board's Master Agreement, which is in effect until June 2012. Carpenters 46 represent the drywall and acoustical ceiling trades in Northern California. The Calabasas library project was slated to begin in March 2010 and the installation of drywall, framing and ceilings was slated for June 2010.

The Carpenters Master Agreement contains a "Work Preservation, Contracting and Subcontracting" clause (Section 50), which provides, in part, that,

> The terms and conditions of this Agreement … shall apply equally to any subcontractor of any tier under the control of, or working under oral or written contract with such individual employer on any work covered by this Agreement with the Union. Such subcontract shall state that such subcontractor is or agrees to become signatory to an appropriate Agreement with the Union and will comply with all the terms and provisions of said

Agreement including the payment of wages, Trust Fund contributions and fringe benefit payments.

In March 2010, Zolman accepted Drywall Art's bid. Zolman project manager Mostofian informed Drywall Art president Alberto Gasca that Zolman was unionized and that in order to be able to do the work, the Charging Party would have to "join the Union." According to Gasca, Mostofian informed him that he had spoken to the Union and it had acceded to let the Charging Party participate in the project as a signatory of the Agreement for the Calabasas project only. Gasca responded that he would consider the proposal. Despite Mostofian's prior assurances, within the next few days, a Charging Party representative called a Union representative to ask if the Union would allow the Charging Party to be a signatory to its contract for just one project. The Union representative said no.

The next day, Union representative Rick Bonilla called Gasca and told him that if the Charging Party was going to work on the Calabasas project with Zolman, it had to "join the Union" because Zolman is a signatory to the Union Master Agreement. Gasca told Bonilla that Zolman's invitation to bid did not contain any requirement that the company had to be a Union shop and that the only requirement was that the prevailing wage had to be paid. Bonilla responded that the Union did not want to exclude the Charging Party but that if it did not "join the Union," it would be kicked out of the project.

Upon review of the Charging Party's proposed commercial contract with Zolman, Gasca noted that Section 19 obligated the Charging Party, as subcontractor, to "expressly agree[] that all of the provisions of the applicable labor agreements and carpenter agreements [which Zolman had signed] are incorporated into this Subcontract as if they were set forth in their entirety." Gasca declined to sign the agreement with this language.

A few days later, Zolman informed Gasca that the company was bound to the terms and conditions of the Union's Master Agreement, which covered metal stud framing and the installation of drywall. Zolman indicated that any employer who chooses to subcontract work covered by the agreement to be performed at the jobsite has to subcontract to an employer signatory to the appropriate agreement with the Union. Zolman indicated that it could not change this requirement, and since the Charging Party refused to sign the contract as proffered with the language of Article 19, set forth above, Zolman would search for a different subcontractor for the Calabasas project.

ACTION

We conclude that the charge should be dismissed because the clause is protected by Section 8(e)'s construction industry proviso. Section 8(e) makes it unlawful for any labor organization or employer to enter into or reaffirm a contract requiring the employer to cease doing business with another employer or person. However, a contract clause that technically falls within this prohibition will be found lawful even if secondary in nature, if the clause satisfies the requirements for exemption under Section 8(e)'s construction industry proviso.[1] The construction industry proviso exempts from the 8(e) proscription agreements entered into within the framework of a collective bargaining relationship[2] between labor organizations and employers in the construction industry that relate to contracting or subcontracting of work at a construction site.[3]

Here, there is no question that the contracting employer is in the construction industry. Secondly, the installation of drywall, acoustical ceilings and metal framing at the Calabasas municipal library site conforms to the requirements of the construction industry proviso as construction work to be performed on the site of a construction project. We further conclude that the union signatory clause was a product of a collective bargaining relationship between the Respondent Union and Zolman, the signatory general contractor,[4] in that, although Zolman does not currently employ bargaining unit carpenters, the Master Agreement offers it the opportunity to do so through the hiring hall or by other means. Accordingly, the Union's enforcement of the clause is statutorily protected and the charge should be dismissed, absent withdrawal.

B.J.K.

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[1] See, e.g., Iron Workers (Southwestern Materials), 328 NLRB 934, 936 (1999).

[2] Connell Construction Co. v. Plumbers, 421 U.S. 616, 631-33 (1975).

[3] National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 638-39 (1967) (construction industry proviso "was intended ... to allow agreements pertaining to certain secondary activities on the construction site").

[4] See Connell, supra.